

USDOL/OALJ Reporter

[*Ryan v. Niagara Mohawk Power Co.*](#), 85-ERA-24 (ALJ Jan. 7, 1986)

Go to: [Law Library Directory](#) | [Whistleblower Collection Directory](#) | [Search Form](#) | [Citation Guidelines](#)

U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse Room 409
Boston, Massachusetts 02109

Case No.: 85-ERA-24

In the Matter of:

John E. Ryan
Complainant

v.

Niagra Mohawk Power Company
Respondent

Appearances:

Dante Scaccia, Esq.
342 So. Salina St., Ste 220
Syracuse, New York 13202-1663
For Complainant

Robert W. Kopp, Esq.
One Lincoln Center
Syracuse, New York 13202
For Respondent

Before: Anthony J. Iacobo
Administrative Law Judge

[Page 2]

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This is a proceeding under the Energy Reorganization Act of 1974, 42 U.S.C. 5851 and the implementing regulations found in 29 Code of Federal Regulations Part 24, whereby employees of employers subject to the Act and regulations may file complaints and

receive certain redress upon a showing of being subjected to discriminatory action resulting from protected activity. The hearing in this proceeding was held in Syracuse, New York, on October 4 and October 22 through 25, 1985. The parties appeared and were given the opportunity to present evidence and argument. Briefs were received on December 23 and 27, 1985.

I Procedural History

This case stems from a complaint filed by Mr. John E. Ryan with the Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor alleging he was subjected to discriminatory conduct by respondent, Niagra Mohawk Power Corporation (NIMO), because of certain activity protected by section 5851(a)(1-3) of the Energy Reorganization Act (Act) 42 U.S.C. Sec. 5851 (1974). Specifically, Ryan contends that his participation in a quality assurance audit during the late winter of 1984 and his subsequent testimony before the Nuclear Regulatory Commission concerning the audit, resulted in a poor performance rating, issued in early December 1984. The allegations were denied by NIMO, and on February 27, 1985, after the matter was investigated by the Wage and Hour Division, and an attempt at conciliation having failed, the Assistant Area Director issued his determination concluding that the investigation failed to support the complaint. A timely request for hearing was filed. While the timeliness was disputed by NIMO, which moved to dismiss the complaint, the Secretary, by order dated August 1, 1985, rejected this contention and remanded the matter to the Office of Administrative Law Judges for hearing and the issuance of a recommended order.

This proceeding was scheduled for hearing at an earlier date. However, due to the withdrawal of the Public Interest Law Firm of Syracuse University, College of Law as lead counsel, on October 4, 1985, at a preliminary hearing, the matter was continued to be heard on the merits on October 22, 1985 and

[Page 3]

thereafter.

After a careful review of all the evidence of record I find and conclude that the complaint filed by Ryan is without any basis in fact and recommend that it be denied.

II The Basic Issues Addressed

While the hearing in this case encompassed five days, 852 pages of transcript and over 80 exhibits, the basic issue present in the complaint is whether or not the performance evaluation of Ryan, dated November 20, 1984 and presented to Ryan on December 6, 1984 for signature (CX 41), was influenced in whole or in part by the Respondent's disaffection with Ryan's participation in protected activity critical of NIMO's quality assurance program in the nuclear sector. The performance evaluation purports to evaluate

the employee's performance for the preceeding twelve month period of employment. Necessarily, if the employee had been the subject of an evaluation a year earlier, one should review the contents of the earlier evaluation in the light of the the employee's subsequent activities and the resultant evaluation, to see whether or not the most recent evaluation properly reflects what transpired during the interim period. My summary of the facts, and my discussion and conclusions are drawn from the facts of record which are relevant and material to this purpose.

III Summary of the Evidence

Complainant, Mr. John Ryan has a Bachelor's degree in Education, some additional post-graduate training and rather extensive experience in public relations and marketing. Until his employment with NIMO on August 8, 1982, he had not had any experience as an employee of an electric utility or as a quality assurance auditor with an electric utility. He had some experience with an employer engaged in one aspect of nuclear power, United Aircraft Corporation, which was involved in nuclear propulsion for naval vessels. His work, however, was in the field of public relations. TR 245. Just prior to his employment with NIMO he worked for the "Reagan Administration" for two years". TR 246. It is unclear whether or not he was a government employee and the nature of his duties, other than public relations. It is clear from the time frames that Ryan's government service was not much more than one year. For five or

[Page 4]

six months thereafter he rested at the family farm before taking on his duties with NIMO in August 1982 *Ibid*. At first he was apparently assigned to do predominantly public relations work in and for the Quality Assurance Department (QAD). Although, he allegedly spent two-thirds of his time on public relations work and one-third on quality assurance, his title was "Quality Assurance Technician." TR 247. Initially, he had an office near the quality assurance departmental vice president, Mr. Donald Dise. In a short time he passed the lead auditor examination and applied for an official designation to that effect. He was rejected by both Dise and Mr. Elwood Treadwell in 1983, before Audit 4. TR 375. This designation has not yet been forthcoming. During the first four or five months he reported directly to Mr. Dise. Tr 254. In this period he established various public relations and educational programs. In January 1983 Mr. Dise moved him to Mr. Treadwell's staff and for the next twelve months he reported to Treadwell "on paper." Although he was apparently physically removed from the proximity of Dise's office he testified he nevertheless spent about 2/3 of his time reporting to Dise who, allegedly, had no public relations experience, and during the balance of the period he reported to Mr. Rudolph Norman. In this connection he was assigned to audit team #4 in January 1984, near the end of the month. TR 257. He had participated in prior audits. Mr. Anthony D. Laratta, as lead auditor on the team, assigned him the non-technical elements of the team's duties. This included, for example, the preparation of a checklist expounding the areas to be covered by the audit. The audit team of four persons, Laratta, Norman, Ryan and a Mr. Lawrence O'Connor, the latter two consituting the junior members, was

subdivided in to two sub-teams consisting of Laratta and Ryan, and Norman and O'Connor. As is noted in connection with the summary of Norman's testimony, the audit team observed numerous deficiencies and was thereby prompted to prepare a so-called "significant deficiency" (SD) report. This was still in a preliminary or draft stage and the subject of further discussion within the Quality Assurance Department (QAD) when Ryan, pursuant to instructions, proceeded to brief other members of the NIMO staff about goings on in Quality Assurance including audit team #4's preliminary findings. A Mr. Kalish was among those present. Either through the inadvertant leaving of the SD draft report on a desk by Ryan or by less innocent means, Kalish apparently obtained possession of the SD report and it eventually found its way to senior management levels. This reverberated down to Dise who expressed his chagrin

[Page 5]

to Ryan. Ryan, after some investigating, professed his innocence to Dise, who apparently declined to discuss the matter further.

As was brought out in the testimony of Laratta and Norman, noted *infra*, the audit team's report, over the objection of at least three of the four team members, was extensively rewritten by supervisory and/or consultative personnel and submitted to the team for signature. Ultimately Laratta, as team leader, signed off, but allegedly under a sense of duress. The reason for the team's failure to go along with the "editing" was the belief that the company management's "purged" version failed to contain all improprieties found by the team.

In this atmosphere, Ryan began to receive, what he believed to be harassments from his supervisors, although he appears to have started a "harassment diary" some time earlier. TR 438. These took various forms including repeated rejections of a travel voucher, despite the fact it involved about thirty dollars, and an attempt by Treadwell to impose a five day suspension on Ryan without pay for allegedly disobeying orders. This involved the dissemination of an article authored by Ryan on the disposal of atomic waste materials which was to be an attachment to a PAD newsletter. While Ryan did not circulate the newsletter, he circulated the attachment, allegedly believing this was not included in Dise's specific proscription not to circulate the newsletter. When Ryan protested to higher authority, the suspension was revoked and he lost no salary. The formal "company" apology requested by Ryan was never issued.

On the other hand it was brought out on cross examination, although Ryan denied recollection of the document, that he, Ryan, was admonished on August 3, 1983, long before the audit #4 activities, to refrain from issuing memoranda which were adversely critical of fellow employees. RX 13. This admonishment was the subject of a specific notation in the November-December 1983 evaluation of Ryan. CX 1 and 2. Despite this, Ryan apparently persisted in such conduct and this was again noted in the 1984 appraisal CX 41. For example, as indicative of Ryan's earliest "assessments" of NIMO operations and estimations of fellow employees, on September 30, 1982, within two months of his

employment he was writing that "... Supervisors apparently can not supervise, ... supervisors apparently do not have the respect or loyalty of their employees ... my associations with them (supervisors) revealed that they do not honor their word or follow through on actions from one

[Page 6]

meeting until the next." RX 38, p. 1. This was addressed to "Arlene" [Spiddle] who apparently was, at the time, an aide to Dise, the person in charge of QAD. Later on December 29, 1982, just four or five months after being hired, he wrote to Dise that "I do not feel that I need any more *general training courses* at Niagra Mohawk." (emphasis in the original) RX 24; Ryan then proceeds to give a summary of his work history, declaring he is a "summa cum laude graduate from the 'school of hard knocks' in the business spectrum." *Ibid* p. 2. He continues ... "It is my conviction that I do not need any more NMPC (NIMO) training to perform my activity unless it is nuclear and you want to pursue it." *Ibid*. A few days later, on January 4, 1983, he provided Dise with "an objective critique on our Quality Assurance training (as a participant in it)" RX 25. This proceeds to give rather ungenerous appraisals of various training programs he had attended. There is no evidence of record that this was solicited advice. It is noteworthy that around this time Ryan was removed by Dise from his immediate staff and directed to report henceforth to Treadwell. Treadwell in the summer of 1983, admonished Ryan to refrain from offering "critique" when none was requested. RX 29. On September 20, 1983, Dise, in a memo to Ryan "directed" him to attend prescribed training assignments and to "follow the instructions of your Manager, Mr. E. Treadwell..." RX 26. This admonishment of Ryan was continued in the evaluation for November 1983 when under the category "Communications/Relationships" measuring "activities associated with establishing and maintaining productive relationships with co-workers, customers or the public in the performance of one's job", he received his lowest rating "4". The comment is very pertinent to the facts of this case:

John expresses himself well both verbally and in writing. Presentations are well done. He participates well in joining working relationships such as audits and emergency preparedness activities with PACC. On some occasions, John has reacted strongly to criticism of his work in writing, resulting in amplifying the problem rather than working to correct the situation or misunderstanding... These memos have stopped since August 83, as requested. Some examples have turned up recently, however, to show corrective action is not complete. When faced with directions that he does not like, John has accepted the narrowest of interpretations to continue maintaining his course of action - John must continue to improve in his

[Page 7]

communications and relationships to build trust and confidence. John should resolve problems through personal contact rather than through critically writing memos. Use chain of command with the Quality Assurance Department. John

shows a very positive interest toward the Quality Assurance Division and the company. CX 2.

Included in the "corrective actions segment is the notation. "Continue to work out problems and reach agreements in direct negotiations," and, as "correction indicator," "No issue of memos containing statements counter to the continuing good working relationships." *Ibid* p.3. Yet, when Treadwell imposed a five-day suspension in early April 1964, which Ryan successfully appealed, Ryan, on April 19, 1984 wrote to Dise the following:

During the last two weeks of your absence, your "QA Management" (as they term themselves) have taken some extensive liberties with the conduct of the QAD. The latest action, following their ill-advised atrocity on my person of April 10th, (abrogated by corporate action on April 13, 1984), was a departmental memo QA840525 dated April 5, 1984, to the "Quality Assurance Department Staff from the triumvirate as signatorys.

I find that their instructions to the QAD is another flagrant violation of established company policy on expense accounts. This is a formal protest to the corporate management who directed our expense account policy last June 17, 1983. This is also notice that my April expense account *will not* comply with their instructions, but will follow the rules of established company policy.

This policy appears in Appendix V of my "Duties of the Desk" *which you have been using as a model for department-wide development*. Each of your management trio have a copy of my "Duties" (QA83304B) dated December 5, 1983. The policy to which I refer was adequately and graphically detailed by Mr. J. M. Haynes on June 17, 1983. He directed it to all corporate officers, Department

[Page 8]

Heads, Managers and Superintendents. *You* then disseminated it to all QAD Members as "The Bible" on July 25, 1983.

Unless Mr. Haynes has changed this policy since last summer, I suggest that we continue to abide by it. In the future it would be more adviseable if you did not leave "Foxes guarding the chicken house". (Emphasis in the original). CX 11.

Copies were sent to three executives and "QAD Managers, Supervisors and Leads." *Ibid*.

While Ryan apparently followed the evaluation form's instruction, in November 1983, by noting that he considered Treadwell's November 26, 1983 evaluation "inaccurate" and that he wanted to "...discuss this evaluation with someone other than the supervisor who evaluted [him]" CX 1, in 1984, specifically on December 6, 1984, he refused to sign the evaluation altogether. CX 41, p. 4. The evaluation contains five categories with ratings, on a scale of one to ten, with a maximum of 50 (TR 661). The categories are as follows: "Decision-Making/Judgment - Measures the ways in which an employee makes choices and resolves uncertainties in deciding the course of action required to achieve acceptable results." While stating that Ryan "has developed into a good auditor and works well with

others in an audit team," the commentary also notes that "Many times his reaction to management decisions that he does not agree with results in inflammatory notes and memos which are abusive and often erroneous. When faced with decisions he does not agree with, he appears to think it is his responsibility to correct the situation by himself in his own way and does not assess the consequences of his actions." He was given a "3" CX 41, p.1. The essence of this assessment of complainant's conduct as an employee of the company is found in the other four categories. Under the category: "Initiative/originality - Measures actions which an employee takes in response to demands or opportunities arising on the job." while recognizing Ryan's effectiveness at times and "initiative to get things done...", it is also noted that he is "overly-self-reliant" and "When John's views differ on methods to achieve objectives, interest lags and projects slow." *Ibid*. His rating was "61". In the category of "Communications/Relationships," explained earlier in connection with the 1983 evaluation, the commentary lauds Ryan's abilities

[Page 9]

in expressing himself "well both verbally and in writing" and in developing effective audit checklists, but observes that he also " ... fails to understand the loss of trust [he engenders] when he reacts to criticism by issuing written communications to supervisors and managers." The rating is "4". *Ibid* p. 2. The category dealing with "Productivity/Proficiency - Measures activities which contribute to achievement of the desired quality and volume of work by the employee as an individual," recognizes that Ryan is a hard worker and applies himself. "When he has an assignment he is in agreement with His productivity and that of the audit organization suffers badly when he disagrees with a management decision and he draws many of his associates into lengthy non-productive discussions." The rating is "4". *Ibid*. Another '4' rating is issued in the final category, "Supervision/Leadership - Measures the ways in which authority is exercised and results achieved through the work activities of assigned personnel - as a group or individuals." The critique notes Ryan's strengths "in developing clear goals, participating very well in group situations, using his negotiating skills..." it observes that "... John has lost the respect of his peers due to his continual expressions of dissatisfactions with the supervision of the quality Assurance Department. He has not supported or actively agreed to required training..." and refers to a September 1984 memorandum from the QAD Vice President "directing" his participation. *Ibid*. The "Overall Performance" 'was' "satisfactory", the same as the prior year but with 20.75 weighted points, as against 27.0, in 1983. CX 41 and CX 2.

Mr. Rudolph Norman, a registered professional engineer with a degree in mechanical engineering, testified in behalf of Mr. Ryan. Mr. Norman was first employed by NIMO some years ago, remained in their employ for several years and then worked elsewhere and, for about 15 years, in private practice as a professional engineer. In this capacity he worked with several large construction contractors. He returned to NIMO in June 1979. It appears that he at first was given added responsibilities and some advancement, moving from quality assurance engineer to lead quality assurance engineer, acting supervisor, and

supervisor. He later had a difference of opinion with his superior in the line of command, Mr. Dise, the Vice President for quality assurance, regarding the burden of his responsibilities and was dropped from his supervisory position. He became a lead quality assurance engineer, non-nuclear. In due course, Dise asked Norman to establish an audit team to perform

[Page 10]

an audit on certain nuclear quality assurance operations. It was explained that audit teams are purposely chosen from groups who are not themselves attached to the group being audited. Thus, while the members were part of the QAD they were not in the nuclear quality assurance section. Norman chose Anthony Larotta as the lead auditor and John Ryan and Lawrence O'Connor as team members. Inasmuch as four persons constitute an audit team and there was some difficulty in obtaining others, Norman appointed himself as the fourth member. The audit took several days to one week before the data was converted into a draft report. (CX 22). The audit took place from some time in late January until early February 1984 and a draft report was prepared and submitted in house for comment. It found many deficiencies, the high member prompting the issuance of a significant deficiency report coupled with a recommended "stop work" order. The audit, which took place from January 24 to February 3, 1984 revealed three basic shortcomings in the quality assurance department (1) Individuals were not qualified for the functions they were performing, that is, were "misassigned", (2) individuals were performing functions for which they failed to satisfy the "current proficiency" requirements, and (3) of an approximately 8% sampling of surveillances, 90% were not in conformance with the regulations. The audit report sparked what Norman termed as seven exit critiques. The first of which was in early February 2, 1984. Some were with supervisors higher in the chain of command and at least one was with personnel from Management Analysis Corporation (MAC), an organization retained by NIMO to assist with quality assurance when this phase of operations had been criticized in an earlier audit. Norman was of the opinion that the unfavorable findings of the audit team and the team's refusal to "play down" its findings despite the discussions resulting from the "exit critiques", resulted in adverse retaliatory actions taken against him and Ryan. He noted that the original audit draft report was redrafted by others so that only eight findings of areas requiring attention remained instead of the original thirty. He noted that the authors were not members of the audit team. The upshot of the turmoil resulted in an investigation by the Nuclear Regulatory Commission which is still active. In the meantime events have taken place which Norman believes were designed to harass him due to his participation in the audit team's draft report. He cited, as examples, difficulty he had with Mr. Dise in his performance rating, extraordinary scrutiny of his expense vouchers and removal for nearly two months from the list of qualified lead

[Page 11]

auditors. Cross-examination, however, pointed out that Norman and Dise had tangled sometime before the audit. Also, there was a disparity both in the amount of a bill and the length of stay that Mr. Norman had at an Arizona Convention in February 1984, after the audit came out, and Mr. Norman, and Mr. Larotta, were two of five lead auditors who were temporarily suspended, apparently because they, themselves were not currently qualified. They were later reinstated, together with others. Without going into the details of this peripheral area, it is quite clear that Norman's view of the situation was not persuasive, by the time the cross-examination was completed. Further, it would seem that after his demotion from supervisory status, well before Audit No. 4, his status was no more than that of a senior staff member and difficult for him to accept in view of his prior, more exalted, status.

Mr. Norman noted that since he had been Ryan's "first line supervisor" for a major portion of the twelve month period preceding the evaluation which became the subject of this complaint, he submitted, as was the custom, recommendations for the consideration of Ryan's then supervisor, Wesley Williams. The final official, evaluation gave Ryan 16 1/2 points less than would have been given by Norman, had his recommendations been followed. As an immediate consequence, Ryan received a 2% pay increase rather than 6%. In citing the reason for his favorable evaluation of Ryan, Norman noted that Ryan, whose background was essentially in public relations and non-technical, brought a fresh approach to quality assurance and was most helpful in preparing memoranda which captured the intent of the auditors which they, being less gifted in communicative skills, were at a loss to expound.

As was learned from the testimony of others, specifically, Ms. Schwartzoff and Mr. Treadwell, Norman's view of his status and the reality of the situation, are entirely different. His action in making out an evaluation form and recommending Ryan for a promotion were the acts of a "mere volunteer."

Mr. Anthony D. Laratta is employed in the quality Assurance Department of NIMO and, during the period here at issue, was a lead auditor. He was allowed to take the test for lead auditor only after having taken certain courses and being in the department for two years. TR 472. Norman, with the approval of Mr. Norrix, a supervisor, appointed Laratta as the Lead Auditor

[Page 12]

of Audit #4. He outlined the steps he took in getting the audit underway and in attempting the implementation of corrective action for deficiencies which were noted during the course of the audit. Ultimately, when the draft audit was prepared, it was the subject of many meetings with various NIMO personnel, including MAC people attached to NIMO and fulfilling various functions in QAD. He cited a February 13, 1984 meeting, in particular, where Dise accused the audit team of a witch hunt. TR 487. Later, after an attempt by the audit team to redraft their report, its preparation was taken over by others and the approximately twenty-eight deficiencies were reduced to eight in number. CX 24.

The audit team was identified but the audit report, itself, was signed by Laratta and Mr. Thomas Lee, as preparers, and by Wesley B. Williams and Andrew P. Kordalewski as reviewers, on March 13, 1984. *Ibid.* Laratta testified that once the preparation of the audit report was taken out of the hands of the auditors he had no input until the date he was asked to sign the report as a "preparer". He felt he had to sign under "orders". TR 492-494. He also felt subsequent apparent harassment from Dise, who appeared irate about the audit report's findings. TR 495. A few weeks later, his lead auditor's "card" was "pulled." TR 501. The evidence reveals, however, that this was part of a corrective course of action prompted by the audit and also involved individuals who were not part of the audit team. TR 502-3. A few months later Laratta and Norman's status as lead auditors was restored. TR 504. Dise was "released" as a vice president but retained in some consultative status. TR 504-5. Laratta, in turn, received a substantial pay raise. TR 634. Based on his experience on several audit teams with Ryan, Laratta considered Ryan to have conducted himself "professionally" and performed beyond the call of duty. TR 514-5.

Mr. Jay M. Gutierrez, an attorney with the Nuclear Regulatory Commission (NRC) entered his appearance as counsel for Mr. Robert Gramm a Commission employee subpoenaed by NIMO. By way of background, Mr. Gutierrez explained that pursuant to anonymous allegations the first received on April 16, 1984, to the effect that the report pertaining to Audit No. 4, had been "edited and that the particular auditors involved had been harassed," the NRC subjected the "unedited" and "edited" versions to an analysis, to ascertain whether the draft audit report was changed improperly. TR 551. The first aspect of the allegations - the editing of the report - has been the subject of a study and

[Page 13]

report by Gramm as the principal investigator. TR 551. The charge of harassment has been the subject of an investigation, with the report yet to be issued. TR 552. Gramm is the senior resident inspector for the NRC at the Nine Mile Point Unit Two site for slightly more than two years. He compared a copy of the draft report of Audit No. 4 and the final report and compared the two "to insure that the technical concerns were translated to the final report." TR 556. He spent approximately twenty hours, over a period of one month, in conducting his investigation. He concluded that "appropriate deficiencies that were identified in the draft audit were represented as such in the final audit report ..." TR 557-8. Stated differently, he "found that valid deficiencies contained in the draft audit were transmitted appropriately in the final audit report." TR 558. He did not believe that the deficiencies revealed by the audit were of a nature as to warrant a report to the NRC under 10 C.F.R. Sec. 50.55(e), the so-called significant deficiency report. TR 563-4. Nor was any "stop work" order indicated TR 564-5.

Ms. Joanne Schwartzott testified as to the employee evaluation procedures and the significance of various terms and ratings. As here pertinent, her testimony indicated that when an employee disagrees with his performance evaluation, the form provides a block for him to indicate this and a statement of disagreement may be filed by the dissatisfied

employee outlining the basis for the disagreement. In Ryan's instance, as to the 1984 evaluation, he chose to refuse to sign the form. CX 41. In 1983, he checked the block indicating the initial evaluation was "inaccurate". CX 1.

Mr. Edward Treadwell, the manager of the QAD, Non-nuclear Services, was present at the hearing and testified as to his relationship with Ryan and his participation in the 1984 evaluation, which is the subject of the complaint which triggered this proceeding. He has worked for NIMO for nearly thirty years and has had a supervisory position since 1970. He affirmed that in 1982 Dise, as the Director of the QAD, decided that there should be a public relations thrust by the QAD so as to acquaint personnel within the company of the QAD's role in NIMO. TR 765. In August 1982 Ryan began his employment with NIMO at a level 10 position paying approximately \$36,000, per annum, and reporting directly to Dise. TR 766. He was to spend the major part of his time on public relations matters and the remainder, after appropriate training, as a quality assurance auditor. His title

[Page 14]

was quality assurance technician. CX 41. It appears that Treadwell did not share Dise's enthusiasm for the public relations project. Tr 766. In any event, Ryan was assigned, as part of his training as a quality assurance technician, to various training programs sponsored by the company. On December 29, 1982, Ryan voiced his dissatisfaction with some of the programs and instructors to rise via a memorandum. RX 24. Starting with January 1, 1983, Dise reorganized the department and reassigned Ryan to Treadwell, who was designated the manager of the non-nuclear section of QAD. Mr. Robert Norrix was the sole supervisor in the section in charge of all other personnel. Both he and Ryan reported to Treadwell.

Before the end of the first six months of Ryan's employment, while he was reporting directly to Dise, he began to voice criticism of the training programs he was being required to take as a quality assurance technician. RX 24 and 25. Thereafter, there were other episodes culminating in a memorandum directed by Treadwell to Ryan, on August 3, 1983, noting various perceived shortcomings regarding failure by Ryan to follow through on assignments, the dissemination of inflammatory written memoranda, and failure to be a "team player" by "Too forceful insisting on carrying out your own ideas and concepts." RX 35. This resulted in a three-page response by Ryan the first paragraph of which sets the tone of the remainder of the memorandum:

As requested, I'm responding to your memo(s) of August 3, 1983, -- the first and only written communication I've received in the year that I have been here and in the seven months since I've been assigned to you. Woody, as manager of the non-nuclear organization, the bottom line is you can say do anything you wish and there is little that I (or we) can do to alter any position which you may wish to take. That is the privilege of a divine monarchy ... RX 36.

The November 1983 evaluation was performed by Treadwell with input from Norrix and, possibly, Norman. Treadwell, explained that, aside from supervising an immediate function, such as an audit, a lead auditor was not a "supervisor." In connection with the November 1983 evaluation, Treadwell recalled that Ryan was dissatisfied and sent a memorandum to that effect to Dise, who met with Treadwell. The meeting resulted in an upward revision

[Page 15]

of the evaluation. Ryan signed it on December 6, 1983 in Dise's office with Treadwell present. This is reflected in CX 2. In explaining his role in the 1984 evaluation, Treadwell noted that inasmuch as Ryan had remained within his jurisdiction for a significant segment of the period under review, he was merely fulfilling his obligation in submitting his views to Williams, Ryan's then current supervisor. He refuted Ryan's version of the publication and dissemination of Ryan's signed article on nuclear waste disposal. An Act he considered to be insubordinate and warranting the 5-day suspension without pay he attempted to impose. He documented instances when Ryan was warned about failing to observe instructions and writing inflammatory memoranda which were then widely disseminated. I credit Treadwell's testimony to the effect that Ryan's conduct was provocative and presumed authority which Ryan did not possess.

In May 1964, after Dise's departure, Mr. James Perry became Director of the Quality Assurance Department. Perry was employed by MAC. Perry did not share Dise's interest in public relations and told Treadwell to assign Ryan to Norrix and assign him quality assurance technician duties exclusively. TR 799. In July 1984 Ryan was transferred to Wes Williams' section, upon his request to be separated from Treadwell's group. TR 801.

During his service in Treadwell's section in 1984, Ryan was involved in some difficulties involving his wish to type his own drafts and alleged failure to abide by an agreement to have the final drafts prepared by the members of the typing pool, pursuant to the Union contract embracing those employees' function. TR 802. Mrs. Arlene Spiddle was in charge of this matter and was also responsible for reviewing Ryan's time sheets and expense accounts. Without attempting to ascertain which version is correct, for purposes of this decision, it is sufficient to note that from Treadwell's perception of the facts, in at least one instance, Ryan exceeded the authority he was granted regarding a trip to Albany to tend to personal business. TR 804. Again, in the Spring of 1984, in response to a QAD directive regarding expense accounts, issued by Treadwell, Spiddle and Palmer, Ryan, in a memorandum to Dise, who had been on vacation at the time of issuance of the April 5, 1984 memorandum, not only voiced his disagreement with the memo, asserting that it failed to comply with company-wide guidelines, but stated that he *will not* comply" with the "instructions", and circulated the memo to various personnel within and outside QAD. CX 30, p. 6.

[Page 16]

Emphasis in the original). In the same communication, Ryan advised (admonished?) Dise In the future it would be more adviseable if you did not leave 'Foxes guarding the chicken house'" *Ibid*. It was in this context that Treadwell expressed his views to Williams regarding the evaluation of Ryan in November 1984. TR 806-809. Ultimately the evaluation was a composited of the views of Treadwell and Williams, with Treadwell's proposed rating of 15 points being increased by 5.75 points. TR 822-3. Treadwell made clear that the Audit #4 did not involve an evaluation of his the non-nuclear section, of the QAD that his evaluation of Ryan for 1984 was in no way affected by the findings of Audit #4. TR 827. I cannot help but note the contrast between the way Treadwell handled his differences with Williams on the Ryan evaluation and the confrontational style manifested by Ryan whenever he disagreed with various matters herein noted.

Mr. Wesley Williams an employee of Management Analysis Company, (MAC), in November 1964, was serving as a supervisor of the Corporate Audit unit of the Quality Assurance Department. His immediate supervisor was a Mr. Bryant. TR 844. In late August 1984 Williams was present when Perry, as head of the QAD, Directed Ryan to follow orders, cease writing memos and follow the chain of command. If Ryan had any dissatisfaction he was to seek a meeting with the next manager in the chain of command ultimately leading to Perry. TR 838. Nevertheless, when Perry issued a memorandum on October 3, 1984, regarding lead auditor certification, Ryan wrote a response on October 5, 1964 with copies to various individuals telling him he was in error. CX 15. This resulted in a response from Perry calling attention to the August meeting and upbraiding Ryan for his failure to follow instructions and threatening "disciplinary action." CX 16. Ryan, not only entered written comments on the memo and returned it to Williams, but sent another memo to Williams on the subject on October 10, 1984, copy to Perry and to "personnel file". CX 17. TR 841-842.

Williams, in concluding his testimony, essentially corroborated Treadwell's account of the 1984 evaluation process as it involved Ryan. TR 845-6. CX 41. He, too, indicated that Audit No. 4 did not criticize him or his employer, MAC, and that his evaluation of Ryan would have been the same regardless of the existence of Audit No. 4.

[Page 17]

IV Discussion and Conclusions

My review of the record in this case, including the impressions developed throughout the four days during which evidence was being adduced, convinces me that there is no ground for the instant complaint by Ryan against NIMO.

Complainant has the burden of proving the correctness of his complaint. Once he shows some element of illegal motive in the alleged discriminatory conduct, the employer must prove it would have entered into the conduct complained of, even if complainant had not engaged in the protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1964). This is the so-called "but for" test, and is the

law in the Second Circuit. *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61, 62 (2d Cir. 1982). I believe the facts regarding the motivations and the grounds for the actions of Ryan's supervisors in according him what amounted to a mediocre performance evaluation in the fall of 1984, are crystal clear. Ryan's own memoranda constitute the best element in support of NIMO's defense. I sincerely believe, based on the probative evidence of record I that Ryan's participation in Audit No. 4 and his subsequent complaint to the NRC in no way contributed, in the slightest degree to the evaluation he received. It is quite clear that Ryan's memo writing proclivities were a source of irritation to his supervisors. Ryan's obstinate "I shall nots" obviously affected his effectiveness in his work activities generally. In any event, it is obvious to me that even if there were any underlying retaliatory motivation due to Ryan's protected activity, his conduct during 1984 in other areas would have prompted no different evaluation than he received.

To summarize Mr. Ryan's career at NIMO, in August 1982 he was hired to spend about two-thirds of his time on public relations work and one-third auditing, for the Quality Assurance Department - QAD. He was reporting directly to Mr. Dise, a vice president in charge of the Department and had an office next door. By January 1983, he was assigned to Mr. Treadwell, a manager, in charge of the non-nuclear section of the QAD. TR 321. This apparently was right after he wrote two notes to Dise telling him, in effect, that he, Ryan, was too experienced and knowledgeable to waste his time taking various training courses, RX 24, and that NIMO's choice of training programs and instructors were ill advised RX 25. Appended herewith as

[Page 18]

Appendix A. It seems to me no coincidence that Dise not only removed Ryan direct answerability to him but removed him to a much less desirable office space across the street. TR 371-372. This did not prevent Ryan from continuing to write memoranda which dripped with vituperation whenever matters presented themselves which were either not to his liking or not consonant with his understanding of what constituted the correct or proper approach, procedure or policy. One would think, given Ryan's extensive experience in private industry and somewhat more limited experience in government, he would have realized his volunteered critiques were unappreciated. Nevertheless, he continued to challenge various personnel in NIMO. His memoranda to Mr. Palmer, manager of the nuclear section of the QAD, and to Treadwell, regarding a "Corporate Strategic Plan." (RX 28-31) are examples of Ryan going well beyond his immediate job responsibilities. Indicative of the track Ryan was to take in his relationship with co-workers and supervisors at NIMO is a memorandum he prepared and addressed to Arlene (Spiddle) on September 30, 1982, just under two months after his employment at NIMO began. RX 38, (Appendix B). Regardless of the correctness of his observations, it is obvious that his sweeping, denunciations ("Supervisors apparently cannot supervise...do not have the respect or loyalty of their employees...") would not be appreciated by "old hands" in supervisory positions in NIMO. Incidentally, I believe this was the first and last time Ryan felt sufficiently self conscious to express the feeling that he would not be

thought "too presumptions" in expressing his views. Nevertheless, these seem to be rather strong characterizations for one hired to improve the QAD's public relations. They would appear to be more consonant with the duties of an Inspector General commissioned by the Executive Committee of the Board of Directors.

It is with the preceeding history that I view Ryan's conduct during the 1964 evaluation period. His memoranda are no less provocative. Rather than be chastened by the 1983 evaluation, he appears to have been bent on becoming even more notorious. For example, on April 3, 1984, in a memorandum written on his personal stationery, after apparently failing to convince Dise that he should be awarded "Lead Auditor" status, he wrote: "I have no more interest for being a Lead Auditor in this Department, than I originally had for any supervisory position in it." RX 39. The other memorandum, circulated widely, noted *infra*, dealing with his refusal to abide by travel directives,

[Page 19]

issued by his supervisors, supports Treadwell's observation that "...I've never had an employee that continuously bypassed the chain of command and sent memos, again inflammatory, insulting to those receiving them. It was a source of continuous frustration that my counsel with Mr. Ryan to stop that kind of activity was ignored." TR 798. Williams shared this opinion. In referring to a memorandum from Ryan, dated October 13, 1984, CX 17, " ...The next day, on October 10, John Ryan wrote a letter to me referring to the --Mr. Perry's letter of October 9, in essence he was trying to clarify his position but he really was taking a swing at -- what I feel was a swing at Mr. Perry's rebuttal to Mr. Ryan." TR 841. Any fair review of the 1984 evaluation would demonstrate that while Ryan's competence is recognized, his headstrong belief in his own abilities and his irrepressible penchant for writing memoranda impair his effectiveness in each category. For example, in each of the five categories we find: C-1 "He has developed into a good auditor and works well with others in an audit team." CX 41, p. 1 . Ryan's "... reaction to management decisions that he does not agree with results in inflammatory notes and memos which are abusive" *Ibid*. C-2 contains the assessment that "John can be depended on to work well independently without much guidance." However, "When John's views differ on methods to achieve objectives, interest lags and projects slow." *Ibid*. Similar observations are found in the three other remaining categories. In each instance the evaluation is clearly warranted by any fair review of Ryan's memoranda reacting to everything from a two-day trip to a construction site to his resistance to take training or acceptance of specific instructions from supervisors to cease writing critical memoranda. As here pertinent, the most recent such episode, in October 1984, noted above, was when instructions from Perry resulted in a hand written critique by Ryan, on the document itself, which was given to Williams and and a further rebuttal memorandum to Williams, copy to Perry. Ryan seems to relish being irrepressible. This obviously results in his being penalized by frustrated supervisors. His participation in protected activity had nothing at all to do with the mediocre performance rating for 1984, any more than it did in 1983, when no such issue was present. It seems clear that his

supervisor was merely reiterating a message, first given formally by way of evaluation in November 1983.

Inasmuch as the activities of Audit Team No. 4 were the focus of considerable testimony and documentation during the

[Page 20]

hearing, I believe, it is necessary to address myself to the allegation that a "cover up" was being imposed by the NIMO management when it elected to remove the preparation of the audit report, from the audit team, reduced the bulk of the report and failed to issue a so-called Significant Deficiency Report. The irony of the position taken by Ryan, Norman and Laratta, resisting any attempt to reshape their report, is that a NRC inspector, whose testimony I credit, upon careful review of both drafts, failed to agree with the contention. It appears that not only is the contention unfounded, but the inherent virtue in a more concise report suggests a lack of appreciation by Ryan and the others of the skill manifested by the "MAC people" retained by NIMO to aid in its quality assurance efforts. It is also indicative of Ryan's basic attitudinal problems that he continued to lace his testimony at the hearing with contemptuous references to MAC personnel who are employed by NIMO. Obviously, a managerial decision was made at least several levels above Ryan's humble status at NIMO to engage the services of MAC. Ryan continues to resist this decision, apparently viewing MAC personnel as interlopers!

For the foregoing reasons, it is ORDERED that the complaint be DENIED.

ANTHONY J. IACOBO
Administrative Law Judge

Dated: JAN 7 1986
Boston, Massachusetts

[APPENDIX A]

INTERNAL CORRESPONDENCE

FROM J. E. Ryan DISTRICT System

TO D. P. Dise DATE December 29, 1982 File CODE

SUBJECT Status - Training

As you will recall, last summer you asked me to develop a public relations outline relating to quality assurance. This accomplished by August 16, and the manpower assessment which accompanied it showed that public relations in this profile

would occupy approximately (60%) of my time. I've been pursuing my activities along the course of that plan, and training in 1982 occupied the (40%) balance of the time. I've always taken any training program appropriate to a business function. However, after the orientation course, only three of the courses in which I participated since August have been appropriate to this end in my position - the nuclear subjects.

Considering the extent of my past industrial management training and the range of supervisory positions which I held in industry, and also considering the fact that I owned, capitalized, and operated three businesses of my own in the private sector, I do not feel that I need any more general training courses at Niagara Mohawk.

(1) I spent ten years with the General Electric Company. Seven of them were in formally developed industrial management and advanced management training programs. In three supervisory positions, there were from five to 16 people reporting to me.

(2) Employed by United Technologies Corporation for five years - three of them in formally developed industrial management and international marketing training programs. Of the two supervisory positions held, one was internal with 46 people reporting to me. The other, external, was as Manager, World's Fair Air Transportation Operations, with 400 people reporting to me on a three-shift basis. They were represented by three different unions.

(3) Because of transfers and divisional/departments moves within the industrial complex while I was pursuing my graduate work, it took me nearly six years to get my graduate credits in business administration. I lost more credits in transfers between schools than most people earn in graduate work.

In the combination of the foregoing items (1) and (2) in fifteen years with industry, I had a total of ten years in training programs and management course. This was more extensive than the combined corporate training which all employees of our Q.A. Department might every experience.

D. P. Dise 12/29/82

(4) The real value of my corporate training became apparent when I left the industry giants to go into business for myself. In managing three of my own businesses:

(a) I lost over \$57,000 in one of them and subsequently paid every creditor off. Absentee management did not work!

(b) In another, I capitalized to the extent of nearly three million dollars, had seventeen aircraft on lease programs, and successfully liquidated before the market fell out from borrowing.

(c) In the third business, for three years I earned in excess of \$120,000 per annum in fees on management contracts attained entirely from my personal efforts and ability. I functioned as a CEO in established organizations with staffs to 30 people.

Don, I am a summa cum laude graduate from the "school of hard knocks" in the business spectrum. Just about everything that could happen to a man (successfully and otherwise) has happened to me. Mistakes were made - but never the same one twice. Few in this company (let alone this department) know the full aspects of the total business function as well as one who had to meet a payroll weekly or

monthly. Furthermore, if the cash flow was not there, he had to go to the bank to meet the payroll. That's the real world, and no academic theory works better than experience.

It is my conviction that I do not need any more NMPC training to perform my activity unless it is nuclear and you want to pursue it. I know my function well and can do it with one hand behind my back. I like the challenge here and feel I can make a significant contribution. That's what it's all about.

My concern is for the balance (40%) of this position. Do you have something specific in mind? Since the organization will include nuclear and non-nuclear areas, I can envision my function as addressing both quality assurance concerns. I'm fully confident I can handle any business responsibility beyond the current (60%) factor of this position.

Last week, Woody asked me to develop a P.A.Q. for this position. I complied and, per the parameters of the form, it came out to (100%). This is not yet a (100%) function, unless you desire to make it so. Could we discuss the matter in more detail when you return?

xc: E.F. Treadwell

John E. Ryan

[APPENDIX B]

CONFIDENTIAL

September 30, 1982

Arlene:-

As you know I've spent two days at Nine Mile Point this week in Unit No. One and Two. I've detected the preliminaries of some very serious people problems which I feel that you and Mr. Dise should be aware of before you start to assign bodies to the organization chart. I hope you will not think that I'm presumptuous here, but if I was in Mr. Dis's place I would like to be aware of these type conditions.

Allow me to preface my observations with a couple of creditability statements in this area. Some of my (illustrious) background included being a "Headhunter" in my own business, the attached brochure contains some detail. A great deal of my management consulting work in Washington, included organizational trouble-shooting and problem-solving in non-profit Section 501 C (3) & (6) organizations ... business situations not unlike profit organizations. In this Administration, I was detailed from NASA to the White House Office of Presidential Personnel, because of some of this experience. Although *I do not like* personnel work, I was good at it. I can spot problems but more important, I know how to correct most of them. Therefore, this is extremely confidential for your and his eyes only ... no other copy or record exists.

I know Mr. Dise is attempting to develop an organization with supervision from some experienced NMPC Q. A. people. I frankly do not feel that he has the 'raw

material' in-house and therefore he may have to look outside NMPC policy and outside the company.

I will not cover all the details here but generally this is what was discovered in two days at the site: (a) Supervisors apparently can not supervise, (b) Loyalty apparently is the Q.A. manager and not the Q.A. vice president, (c) Supervisors apparently "look- out" the remainder of the NMPC organization and connote the impression that they "run their own show"...but they do not know what that show is, (d) Supervisors apparently do not have the respect or loyalty of their employees ... or the contractors, (e) Frankly my associations with them revealed that they do not honor their word or follow through on actions from one meeting until the next

While company policy, economics and other tangibles dictate that most of the new Q. A. organization will be developed from new people to Q. A., *the supervision of these people should be the strongest possible Q. A. experience in the industry.* It would be a gross mistake, in my opinion, to attempt to lead this new cadre of Q. A. people after the training program with what supervision may be in the Q.A. organization today. I may qualify this statement with *one* exception.

Arlene, I think Mr. Dise should seriously consider seeking out *experienced Q. A. supervisors and managers* from the ranks of T. who has announced that they are canceling four Nuclear reactors from American Electric Power, from Duke Power and from Consolidated Edison.

This recruitment can be accomplished by NMPC just like the "Headhunters" do it and without using them. This is the way I used to "raid" the industry for a client who paid a handsome retainer:

1. Place a 2 column by 3 inch ad in the home town newspaper of the "targeted" organization. i.e. Duke Power, the Pittsburgh papers.
2. The ad might state: "Large electric utility firm seeking 3-4 Quality Assurance managers/supervisors experienced in Nuclear and non-Nuclear areas. Representatives of firm will be at Hilton Hotel Suite ____ Friday, Saturday and Sunday October 15, 16, 17 (or other date). For private appointment please call (local phone no.)".
3. The ad would run for the entire week before the appointed dates, starting with the previous Sunday edition.
4. You obtain the services of a public phone answering service in advance so that number can be included in the ad. <P
5. The phone answering service will obtain most basic data such as Name, position, company, length of service, reason for seeking a change, salary, etc. and the answering service will give the candidate a one hour appointment for the initial screening. Company identification *is not given* here.
6. At NMPC the Employee Relations staff could arrange for all these details but you and/or Mr. Dise should be available for the appointments. Company identified for first time here.

(OPTION)

7. The other approach is the same type blind Ad in the Wall Street Journal on Tuesday(s) seeking resumes of "highly experienced Q.A. Managers/Supervisors"

to a Wall Street Journal Box No. These will then be forwarded to you two weeks later.

I found the above direct approach to be much more satisfactory and faster. Those you like are then invited to Syracuse for a more intensive secondary interview.

Those who did not make it get a well-developed "Sorry" letter because they know who you are at this point. If ----- (7) was utilized they would not know and a "Sorry" letter would not be necessary.

I hope you might find this helpful, I also trust that you will not consider me too presumptuous in this matter. This information is shared because I can offer a solution, which will work. I think Mr. Dine is seeking some workable solutions these days. This is a tough problem to address, arb

No signature.

No copies.

Typed at home.

CONFIDENTIAL

[APPENDIX C]

C O N F I D E N T I A L

January 4, 1983

Further to our conversation of last evening re-training, as you know I spent quite a few years after I left the manufacturing industry programs as an objective critique on our Q.A. training (as a participant in it):

- (a) The Stat-A-Matrix program is ineffective. Basically this organization is orientated towards the food and drug/cosmetic industry and the majority of examples used in the class were from F.D.A. regulations, not N.R.C. The firm, if they continue with NMPC for future training, should be required to do their own homework first and read NMPC's procedures and Q.A. manual and relate to it in class rather than GMP programs (Good Manufacturing Practices). The case histories that they utilize should be re-worked using nuclear examples and situations. Our N.R.C. commitment is to our P.S.A.R. and the Q.A. Auditing course should be developed toward this end rather than a "blue sky" ideal.
- (b) The instructor may have been a wrong choice. He was a statistical specialist...and acted like one! (the remainder of this statement I'll cover with you in person, perhaps over lunch someday). The human relation aspects of Q.A. have to be sold and this is perhaps the biggest job that we have to accomplish around

here. The human relations "soft-sell HOW" should be developed in classes like this with company neophytes. If one goes charging into a company, or another NMPC department, riding a Mack truck with the bulldog growling that "He is a Q.A. Auditor," he is going to get thrown out on his kieester and the remainder of us will be spending most of our time waving the Haehl letter and making amends.

(c) I don't know if we are committed via contract to the Mock-Audit program with Stat-A-Matrix or not. I think that end would be much better served if 2 or 3 members of the class, who you wished to be nuclear auditors were assigned to each of the UTL auditors, as observers for one or two audits. They would derive much more of the practical aspects of the business from it, plus they would also get a great deal of the necessary "human relations" aspect of auditing from this exposure...and it would not cost us an additional ,000 per day plus expenses.

(d) Frankly, the General Physics Corporation, program, instructor and their entire orientation was more attuned to the Nuclear Industry than was the Stat-A-Matrix firm. As a contractor organization, they were much more adroit to nuclear orientation. The "Hows" were better illustrated and the "Whys" were effectively explained...and the instructor knew the power generation business.

Don, this is not a criticism of Jeryl or her efforts. We all learn from our mistakes and perhaps she has here also, as she, too, was a participant. I realize that this was a first time effort. But the second time around, hopefully, this critique and observation may generate some meaningful questions on the program.

s/ JOHN

C O N F I D E N T I A L

